IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.850 OF 2000

WITH

CIVIL APPLICATION NO.8651 OF 2000

Kisan Bajirao Babar ...Appellant

Versus

Nilkanth Parabati Babar,
since deceased through his
heirs & legal representatives:
1A.Bhairu Nilkanth Babar & Ors. ...Respondents

.....

Mr.Vivek Salunkhe i/b Mr.P.B.Shah for Appellant.

Mr.H.D.Gole for Respondents 1A to 1C.

Mr.A.K.Patil for Respondent No.4.

.....

CORAM: A.M.KHANWILKAR, J.

AUGUST 1, 2006.

P.C.

1. Heard Counsel for the parties.

2. Admit. Mr.Gole waives notice for

Respondents 1A to 1C. Mr.Patil waives notice for Respondent No.4.

3. As short question is involved, this Appeal from Order against the decision of the 3rd Additional District Judge, Satara dated October 17, 2000 below Exhibits 59, 60, 61 and 69 in Regular Civil Appeal No.209 of 1992 is taken up for final disposal forthwith, by consent.

4. The limited issue that requires to be considered in this Appeal is: whether the Court below was right in rejecting the application preferred by the Appellants for condonation of delay in taking out application for substitution and setting aside abatement and further relief of bringing on record heirs and legal representatives of the deceased party. It is not in dispute that the Respondent Nilkanth Parabati Babar died on June 3, 1993, leaving behind five heirs as noted in the Application Exhibit 59. It is the case of the Appellants that when he had engaged Advocate Mr.I.R.Bagwan to pursue the proceedings on his behalf, his Advocate Mr.Bagwan advised that it was

necessary to bring on record heirs and legal representatives of the deceased Respondents who had died on 3rd June 1992 after the dismissal of the Suit and pendency of the Appeal. On such advise, the Application came to be filed. The Court below has taken the view that as the justification given for delay of over six years was not acceptable, the same not being sufficient cause, request made on behalf of the Appellants will have to be rejected.

5. Before this Court, the Counsel appearing for the Appellants contends that the Court below has committed manifest error in rejecting the prayer of the Appellants, especially when the cause for condonation of delay was on the assertion that the Advocate for the deceased party-respondent had failed to send intimation in terms of order XXII Rule 10A of Code of Civil Procedure. In such a situation, even if the Appellants had knowledge about the death of deceased Respondent, that will not absolve the Advocate for the deceased party to discharge his duty by sending intimation as required by the said provision. To buttress this

submission, reliance is placed on the decision of this Court in the case of Atchut Upendra Raikar vs.

Survya Upendra Raikar (since deceased) through his LRs. & Ors. decided on 10th February 2006 in Writ Petition No.262 of 2005 [2006(6) LJSOFT 103]. Counsel for the Respondents, however, supported the order passed by the lower Court and would contend that the principle stated in the case of **Atchut Upendra Raikar (supra)** is in the fact situation of that case and will not be of any avail. Insasmuch as, in that case, the application was filed by the Petitioner in less than six months period from the date of death of Defendant No.5 who was party to the proceedings.

6. Having considered the rival submissions, I have no hesitation in accepting the case made out by the Appellants before this Court. It is seen that the Appellants have taken specific ground in the Appeal that the lower Court has failed to address itself to the requirement of discharge of obligation by the Advocate for the deceased party in terms of order 22 Rule 10-A, being ground No.7.

I have no difficulty in accepting the argument that if such plea is available to the Appellants and has been taken, as a necessary corollary, the

Appellants would succeed. In the first place, the Trial Court has not considered this fact at all in the impugned order. Merely because delay is over six years and the fact that the Appellants had knowledge about the death of deceased Respondent, that will make no difference to the legal position stated. Even in that case, the Court has recorded that the Application for condonation of delay was not on the ground of unawareness of the date of death of the deceased party but specifically on the ground that the Advocate for the deceased party failed to send intimation in terms of Order XXII Rule 10-A of the Code.

7. Viewed thus, I have no difficulty in allowing this Appeal and setting aside the impugned Judgment and order, following the principles stated in the above said decision. In other words, the Applications preferred by the Applicants, Exhibits 59, 60, 61 and 69 in Regular Civil Appeal No.209 of

1992 are allowed. Appellants shall take steps to carry out necessary amendments in the main proceedings pending before the Appellate Court, which will have to be revived in terms of this

order. Amendment to be carried out within four weeks from today.

8. Parties to appear before the lower Court on 31st August 2006, so that, the lower Appellate Court may pass appropriate directions, as may deem fit. No order as to costs.

9. In view of the above order, accompanying Civil Application also stands disposed of.

A.M.KHANWILKAR, J.